Supreme Court, U. S.
FILED
MAR 8 1976
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1975
No. 75-1127

E. J. DELANEY CORPORATION and
SKI KIT, INC.,
Petitioners,

vs.

BONNE BELL, INC. and JESS BELL,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

FRANK SETH HURD
JASON C. BLACKFORD
C. R. KELLER, JR.
2500 Terminal Tower
Cleveland, Ohio 44113
Attorneys for Respondents Bonne Bell, Inc. and Jess Bell

Of Counsel:

WESTON, HURD, FALLON, PAISLEY & HOWLEY
2500 Terminal Tower
Cleveland, Ohio 44113

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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OPINIONS BELOW

The opinion of the court of appeals (Petitioners App. 1a-23a) is reported at 525 F.2d 296. The opinion of the United States District Court for the District of Colorado denying respondents' motion for judgment notwithstanding the verdict and new trial (Petitioners App. 25a-43a) is not officially reported but is printed at 1975-2 CCH Trade Cases Para. 60,419.

JURISDICTION

The Judgment of the court of appeals (Petitioners App. 24a) was entered on November 11, 1975. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Is evidence of a relevant market and of economic power in that market necessary to prove an offense of "attempt to monopolize" under Section 2 of the Sherman Act?

STATEMENT OF FACTS

E. J. Delaney Corporation ("Delaney")[1] was organized by Edward J. Delaney in 1964 to provide advertising services in ski resort areas. The company advertised by means of a "weather station"—an outdoor formica panel showing wind direction, wind velocity, and temperature as well as advertising copy. By 1970, approximately 60 of these weather stations were being operated on the ski slopes and outside ski resorts.

Ancillary to the operations of the weather stations, Delaney's service personnel distributed free samples of a client's products to ski shops located in the vicinity of the weather station. In mid-1970, the company entered into a contract with Chase Bag to manufacture approximately 600,000 plastic bags to hold samples. Delaney solicited various manufacturers with offers to distribute samples of

1. "Delaney" refers to E. J. Delaney Corporation and Edward J. Delaney interchangeably except as otherwise indicated herein.

their products. During 1970 and 1971, Delaney made contractual commitments to 15 manufacturers. Typical of these commitments was an agreement with Ban deodorant to distribute 300,000 samples. For this effort, Delaney received $9,000.

Unfortunately, Delaney had devised no means of distributing sample packs. In late 1969 Delaney sought to interest the National Ski Area Association (NSAA), a trade association of owners and operators of ski resorts, in the company's sample pack idea in order to solve the critical distribution problem. By the end of September of 1970, the inventory of sample packs was accumulating and still Delaney had not received any word from NSAA.

Seemingly frustrated in one direction, in late 1970, Delaney approached Mr. Parker, the fund-raising chairman of the United States Ski Association (USSA). The USSA and the United States Ski Educational Foundation (USSEF), the fund-raising arm of the USSA, sponsored the U. S. Ski Team in international competition. Delaney initially proposed that the USSA begin a fund-raising drive by having the individual members of the association sell the sample packs for one dollar. Forty percent of the proceeds would go to the U. S. Ski Team and sixty percent to Delaney.

Bonne Bell, Inc. is engaged in the business of manufacturing and selling cosmetics, toiletries and beauty aids throughout the United States. Bonne Bell had sales of approximately $17 million in 1970. The total sales of cosmetics and toiletries in the United States is estimated to be in excess of $1.5 billion. Bonne Bell is, and was, a small factor in this market.

As part of an effort to promote its products, Bonne Bell in 1969 entered into a contract with the USSA which

subsequently was assigned to USSEF, the non-profit, fund-raising entity of the USSA. This agreement, in part, provided that "Bonne Bell shall have the exclusive right to utilize the Ski Team Endorsement on and in connection with cosmetic products and beauty aids;" that "Ski Team Endorsement" means "the right to use the name and logo of the U. S. Ski Team;" and that the USSA and the USSEF "will cooperate with Bonne Bell in its efforts to promote the sale and acceptance of its products." Between 1969 and 1973 Bonne Bell paid the USSEF approximately $182,000 under the terms of this agreement.

At the December 6, 1970 meeting of the USSA, the fund-raising chairman presented a verbal report of his discussions with Delaney. During the discussion one of the directors suggested that Bonne Bell be contacted "since it was a licensee" to see whether it had any objections to Delaney's promotion. The directors, after giving conditional approval, instructed the executive director of the USSA to check the Delaney plan with the association's auditors and the International Merchandising Corporation, a concern which supervises the Ski Team's endorsement of various products.

When Jess Bell, president of Bonne Bell, Inc., was contacted he stated that he was not opposed to the sale of sample packs by USSA members as long as those packs contained no items which competed directly with Bonne Bell. He stated that he was opposed to the promotion of any sample pack containing such competitive products by the USSA under circumstances suggesting an endorsement by the USSA or the U. S. Ski Team. Since the Delaney sample pack contained products which were in direct competition with those manufactured and sold by Bonne Bell, Jess Bell opposed Delaney's promotion scheme as initially presented to the USSA. On December 9, 1970, Parker informed Delaney that Bonne Bell objected.

Subsequently, on December 14, 1970, Edward J. Delaney contacted Bonne Bell personnel seeking to persuade them to alter their decision. As a result of this meeting, Delaney was informed by letter that Bonne Bell "would not oppose your plan if the gift sack did not contain any cosmetic or toiletry items. The other alternative would be that you market a gift set containing any items but with no reference to the U. S. Ski Team or the U. S. Ski Association." (Exhibit 39).

On December 15, 1970, Edward J. Delaney met with Parker to see if the program could be approved on a different basis; i.e. without the use of the Ski Team logo or official endorsement. On this new basis Delaney indicated that the percentage that the U. S. Ski Team would receive would be only 25 percent—as opposed to the original 40 percent. Ultimately, Delaney advanced a sliding scale under the terms of which the Ski Team would receive as little as 5 percent if less than 100,000 packs were sold.

Delaney knew on December 15, 1970, that the USSA was unwilling to proceed with its proposal as initially presented. By then, however, approximately 200,000 packs had been filled and were ready for distribution. Delaney still did not have any means of distributing the merchandise. Delaney was, therefore, in the uncomfortable position of having received $67,000 from suppliers with a mounting inventory of hundreds of thousands of samples and no means to fulfill its contractual commitments.

In an attempt to salvage its program with the USSA Delaney reworked the promotional material and eliminated the Ski Team logo. The redesigned mailer, however (Exhibit 52), specifically stated that the proceeds of pack sales were going to the U. S. Ski Team and strongly implied the endorsement of the U. S. Ski Team. In patri-

otic colors of red, white and blue, complete with stars and stripes, the Delaney mailer proclaimed:

RUSSIANS SUPPORT THEIR SKI TEAM.

WHAT ARE YOU DOING FOR OUR U. S. SKI TEAM?

EXPRESS YOURSELF.

ORDER A SKIERS' HOLIDAY PACK.

NET PROCEEDS DONATED TO THE U. S. SKI TEAM.

U. S. NEEDS YOUR HELP.

On January 10, 1971, approximately 70,000 of these mailers were circulated and eventually over 100,000 were distributed. When this unauthorized mailing came to the attention of a representative of USSA, he stated his firm objection to Delaney. While the mailer purported to be a fund-raising venture for the U. S. Ski Team, no such arrangement had been authorized.

Charles Gibson, President of the USSA and USSEF, called Delaney and demanded that he stop the dissemination of the unauthorized mailers. Gibson also sent a letter to the Ski Industry of America (ski shops), the Ski Area Association, the National Ski Patrol System, the directors of the Association, the Ski Team committee and various ski magazines. In part, the letter stated that the promotion was not authorized and "its perpetuation could conceivably constitute fraud on the public." The letter further stated that "in fact, only about 5 percent of the selling price will eventually go to the Ski Team. An individual, therefore, thinking that his $1.00 for a 'Skier's Holiday Pack' is a contribution may be misled, since most of the $1.00 goes to the promoter." Of the

$12,976.07 net proceeds received by Delaney and attributed to the mailer, the USSA received only $378.00.

In early March, 1971, Delaney learned that there would be a meeting of the USSA's board of directors in Denver. He called Gibson and demanded an opportunity to present his program. The USSA acceded to his demand. Before Delaney's presentation, Gibson briefed the board on the background including his personal view that Delaney's proposal was in conflict with the Bonne Bell contract. Further, Gibson stated that the net proceeds to the Ski Team would be negligible and that he personally did not wish to do business with Delaney.

In Delaney's presentation to the USSA a new program was presented under which the income would be derived from sales of the gift pack to the USSA *ski clubs*. The scheme of selling to *individuals* via mailers was not mentioned. Now the ski clubs would be urged to buy in large quantities and to pay in 30 days with credit for unsold returns. A straight split of 25 percent of the sales was offered and Delaney would guarantee the Ski Team $150,000 for the first year regardless of sales. When asked, however, Delaney declined to put the guarantee in writing. Delaney's mid-December bank balance was approximately $250.00. Delaney's proposal did not include any changes in the contents of the gift pack. In great detail Delaney expressed the view that the USSA and the USSF had made a mistake in giving an exclusive cosmetics endorsement to one of the smallest companies in the industry. He argued that the contract "restricts the USSA from 99 percent of the 1.5 billion dollar cosmetic and toiletry industry." Delaney's presentation was unmistakable—the contract with Bonne Bell is not in the interests of the U. S. Ski Team—breach it—come with us and make more money. The board voted to reject Delaney's proposal.

In October, 1971, Delaney entered into an agreement with the U. S. Olympic Committee under which it was authorized to use the Committee's endorsement and sell the sample packs for $1.50. Delaney kept 80 cents on each sale, and the balance went to the committee. Sales were made by Delaney's salesmen at exhibits and fairs throughout the country. Between October, 1971, and January, 1973, approximately 23,000 packs were sold.

At trial Bonne Bell denied the existence of the so-called ski market. The petitioners were unable to produce any evidence as to the size of the alleged "ski market" or Bonne Bell's share of the alleged "ski market." Further, no evidence was introduced relating the power of Bonne Bell to affect prices or to destroy competition in the cosmetics or toiletries industry.

REASONS FOR DENYING WRIT

I. THIS COURT REQUIRES EVIDENCE OF (1) SPECIFIC INTENT TO DESTROY COMPETITION OR BUILD A MONOPOLY; AND (2) ECONOMIC POWER SUFFICIENT TO PRODUCE A DANGEROUS PROBABILITY OF MONOPOLIZATION FOR THE OFFENSE OF ATTEMPTED MONOPOLIZATION.

This court has clearly delineated the elements of an "attempt to monopolize" under Section 2 of the Sherman Act. The classical statement of *Swift & Company v. United States*, 196 U.S. 375, 396 is quite specific in its definition of attempted monopolization.

> "The statute gives this proceeding against combinations in restraint of commerce among the states and against attempts to monopolize the same. Intent is almost essential to such a combination, and is essential to such

> an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly,—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Com. v. Peaslee*, 177 Mass. 267, 272, 59 N. E. 55.
>
> But when that intent *and* the consequent dangerous probability exist, this statute, like many others, and like the common law in some cases, directs itself against that dangerous probability as well as the completed result." (Emphasis supplied).

Had the *Swift* court gone no further in its analysis of an attempt to monopolize, it might successfully be argued as Petitioners do here that the necessary "dangerous probability" is not the "forces of nature" plus "further acts", but solely the intent iself. Such an interpretation, however, was precluded by that Court when it stated:

> "Not every *act* that may be done *with intent* to produce an unlawful result is unlawful, or constitutes an attempt. It is a question of proximity and degree. The distinction between mere preparation and attempt is well known in the criminal law. *Com. v. Peaslee*, 177 Mass. 267, 272, 59 N. E. 55. The same distinction is recognized in cases like the present." (Emphasis supplied) 196 U.S. 375 at 402.

It is obvious from this statement that the mere coexistence of an act and intent to monopolize is an insufficient basis upon which to predicate a Section 2 attempt case. The *Swift* Court required, in addition, that there be evidence to prove the mandatory "proximity and degree". That evidence clearly is evidence which would logically war-

rant a finding that there is the requisite probability of success.

This precise issue was further discussed by the Court in *United States v. Winslow*, 227 U.S. 202 (1913). Under review was the District Court's dismissal of certain counts of a Sherman Act indictment. In *Winslow*, several large shoe machinery equipment manufacturers had pooled their resources by organizing the United Shoe Manufacturing Corporation. In discussing whether United Shoe could be guilty of an attempt to monopolize, Mr. Justice Holmes for a unanimous court held:

> "Until the one intent is nearer accomplishment than it is by such a juxtaposition alone, *no intent could raise the conduct to the dignity of an attempt.*" 227 U.S. 202, at 218 (Emphasis supplied).

The mandatory importance of the economic power analysis in determining the "dangerous probability" of success has been forcefully enunciated by the Court in *Walker Process Equipment Inc. v. Food Machinery and Chemical Corporation*, 382 U.S. 172. The Court held:

> "To establish monopolization *or attempt to monopolize* a part of the trade or commerce under Section 2 of the Sherman Act, it would then be necessary to appraise the exclusionary power of the illegal patent claim *in terms of the relevant market* for the product involved." 382 U.S. 172 at 177 (Emphasis supplied).

Against this clear background, Petitioners initially assert in their brief that:

> "*Columbia Steel* suggests affirmatively that the specific intent suffices, stating that 'even though the restraint effected may be reasonable under Section 1, it may constitute an attempt to monopolize forbidden by Section 2 if a specific intent to monopolize may be shown'." Pg. 11 Petitioners' brief.

Petitioners for their own reasons, however, do not choose to relate the painstaking care that this Court in *United States v. Columbia Steel Co.*, 334 U.S. 495 took to delineate not only the relevant market but U. S. Steel's share of that market. In the paragraph following the language quoted by petitioners and in the same subject matter context, this Court stated:

> "United States Steel, despite its large sales, many acquisitions and leading position in the industry, has declined in the proportion of rolled steel products it manufactures in comparison with its early days. In 1901 it produced 50.1%; in 1911, 45.7%; in 1946, 30.4%. For the period 1937-1946, it produced 33.2%." 334 U.S. 495, at 533.

While the holding of the Court was based solidly upon a finding that there was no specific intent to monopolize, *Columbia Steel* neither suggests nor stands for the proposition now advanced by Petitioners. In fact, the very language quoted by Petitioners refers the reader to footnote 30 which, in turn, references footnote 24. Footnote 24 is a quotation from *United States v. Griffith*, 334 U.S. 100, 106-107. A portion of footnote 24 is illuminating:

> "For Section 2 of the act is aimed, *inter alia*, at the acquisition or retention of *effective market control*." (Emphasis supplied) 334 U.S. 100, at 107.

The stated emphasis of *Columbia Steel* and *Griffith* on "effective market control" does not suggest an abolition of the requirement of economic market power in an attempt case. Perhaps Petitioners tacitly acknowledge the weakness of their argument when they refer at page 12

of their brief to the "*somewhat* inconsistent line of decisions" of this Court.

Petitioners refer to *United States v. duPont & Co.*, 351 U.S. 377, 395-96, n.23, for the proposition that this Court distinguished a number of prior decisions:

> ". . . on the ground that they involved merely attempts or conspiracies to monopolize and therefore 'the scope of the market was not in issue.' "

Initially, it should be noted that this Court's consideration in that case was directed exclusively to the question of whether or not duPont *possessed monopoly power.* No consideration was given to Section 2 attempt to monopolize cases.

> "*Since the Government specifically excludes attempts and conspiracies to monopolize from consideration,* a conclusion that duPont has no monopoly power would obviate examination of these last two issues." 351 U.S. 377, at 381 (Emphasis supplied).

Petitioners, however, appear to have misread the language of the Court in footnote 23. The language used by the Court refers to "*combination* and conspiracy to monopolize"—not *attempts* or conspiracy to monopolize. In context, the portion of the footnote referred to by petitioners states:

> "In *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, a conspiracy to monopolize trade in vegetable parchment was held to be a violation of Section 2. Parchment paper is obviously no larger a part of commerce than cellophane. *Recovery, however, was based on proven allegations of combination and conspiracy to monopolize, and the scope of the market was not in issue.* P. 560" (Emphasis supplied) 351 U.S. 377, at 395-396 n.23.

Interestingly enough, footnote 23 continues in pertinent part:

> "Also, this Court found in *United States v. Columbia Steel Co.*, 334 U. S. 495, that the *'relevant competitive market' for determining whether there had been an unreasonable restraint of trade (or an attempt to monopolize) was the market for 'rolled steel' products in an 11-state area.*" (Emphasis supplied) 351 U.S. 377, at 396 n.23.

Obviously, Petitioners' interpretation of footnote 23 must bow to the stated language—and the stated language leaves no room for any "interpretation".

American Tobacco v. United States, 328 U.S. 781, involved both an attempt to monopolize and a conspiracy to monopolize. With regard to attempted monopolization, this Court approved the following jury instruction given by the District Court:

> "The phrase 'attempt to monopolize' means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it, which methods, means and practices are so employed by the members of and pursuant to a combination or conspiracy formed for the purpose of such accomplishment." 328 U.S. 781, 785.

Obviously, the instruction required the finding of a "dangerous probability" of monopolization in attempt cases. In granting the petition for certiorari, however, this Court expressly limited the issues:

> ". . . to the question whether actual exclusion of competitors is necessary to the *crime of monopolization* under Section 2 of the Sherman Act." 328 U.S. 781, at 784 (Emphasis supplied).

In the form presented to the Court, therefore, *American Tobacco* was not an attempt case. Petitioners have ripped the language quoted at page 11 of their brief from context. That language quoted in context reads:

> "It long has been settled, however, that a 'conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy.' *United States v. Rabinowich*, 238 U. S. 78, 85, 35 S. Ct. 682, 683, 59 L. Ed. 1211; *Pinkerton v. United States*, 328 U. S. 640, 66 S. Ct. 1180, 1182. Petitioners, for example, might have been convicted here of a conspiracy to monopolize without ever having acquired the power to carry out the object of the conspiracy, i. e., to exclude actual and potential competitors from the cigarette field." 328 U.S. 781, at 789.

In summary, this Court has always required proof of economic power coupled with a specific intent to monopolize. None of the decisions cited by Petitioners in any way derogate from the clear lines drawn by this Court in *Swift*, *Winslow* and *Walker*. The United States Circuit Courts of Appeals have had little difficulty in applying guidelines established by this Court.

II. THE UNITED STATES COURTS OF APPEALS HAVE UNIFORMLY APPLIED THE DUAL REQUIREMENTS OF SPECIFIC INTENT AND ECONOMIC POWER UNDER THE GUIDELINES SET DOWN BY THIS COURT.

The record in this case discloses a total absence of economic data. This unassailable fact was affirmatively stated by both courts below.

> "Thus, in the absence of any showing by the plaintiff as to where the area of competition existed, or what clout the defendant corporation had therein, it was

> error for the trial judge to submit a Section 2 issue to the jury. No facts were before it upon which to base a verdict, and no facts from which inferences could properly be drawn." Petition for Writ, 20A, 21A. 10th Circuit Court of Appeals Opinion.

> "There was little, if any, evidence of the defendant's capacity to achieve or maintain a monopoly in that market." Petition for Writ, 35A. District Court Opinion.

Under established principles, the 10th Circuit required as a matter of law both a delineation of the relevant market and a showing of the economic power of the Bonne Bell in that market. Since there was a complete absence of proof, the 10th Circuit held that the trial court should not have submitted the attempted monopolization issue to the jury. This position is in accord with that taken by the other Circuit Courts of Appeal.

The 1st Circuit has specifically held that there must be a determination of economic power in the relevant market. *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 550 (1st Cir. 1974), *cert. denied* 421 U.S. 948 and *Walker v. Providence Journal Co.*, 493 F.2d 82, 87 (1st Cir. 1974).

The 3rd Circuit Court of Appeals has held that an essential element of an attempt to monopolize is that the actor must have sufficient market power to come dangerously close to achieving a successful monopoly. *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1348-1349 (3rd Cir. 1975).

The 5th Circuit requires a distinct analysis of the relevant market, the competitive structure of that market and the alleged offender's economic power within that market. *Panotex Pipeline Co. v. Petroleum Co.*, 457 F.2d

1279, 1288 (5th Cir. 1972), *cert. denied* 409 U.S. 845 (1972) and *Cliff Food Stores, Inc. v. Kroger,* 417 F.2d 203, 206-208 (5th Cir. 1969).

The 8th Circuit Court of Appeals has consistently required a showing of economic power in the relevant market. *The Morning Pioneer, Inc. v. The Bismarck Tribune Co.,* 493 F.2d 383 (8th Cir. 1974), *cert. denied* 419 U.S. 836, *Agrashell, Inc. v. Hammons Products Co.,* 479 F.2d 269, 284-286 (8th Cir. 1973), *cert. denied* 414 U.S. 1022, *Acme Precision Products, Inc. v. American Alloys Corp.,* 484 F.2d 1237, 1240 (8th Cir. 1973), *Hiland Dairy, Inc. v. The Kroger Company,* 402 F.2d 968, 971 (8th Cir. 1968), *cert. denied* 395 U.S. 961, *Kansas City Star Co. v. United States,* 240 F.2d 643, 663 (8th Cir. 1957), *cert. denied* 354 U.S. 923.

Petitioners assert that the 4th Circuit Court of Appeals adheres to the view that a showing of economic power is not necessary and cite *American Football League v. National Football League,* 205 F. Supp. 60 (D. Md. 1962), *aff'd* 323 F.2d 124 (4th Cir. 1963). While the District Court did state that there could be an attempt to monopolize without the offender actually possessing monopoly power (p. 65), that Court held not only that the defendant *did not possess monopoly power* but also that it *did not have the required specific intent* to destroy competition or build monopoly. The Court of Appeals, without discussing the issue of monopoly power, affirmed the lower court's decision on the basis that the requisite specific intent to monopolize had not been proven. (See p. 132 and n.18.). Petitioners' attempt to torture a *sub silentio* affirmance of a lower court's dicta into a rule of law was specifically rejected by the 4th Circuit Court of Appeals in *White Bag Co. v. International Paper Co.,* 1974-2 CCH Trade Cases Para. 75,188, p. 97,354 (4th Cir. 1974). In *White Bag,* the court stated:

> "We find no basis in the record for a conclusion of an attempt to monopolize. International had not increased its bag conversion capacity, and its share of the multiwall bag market had declined slightly over the preceding five years. The increases in paper production it was able to achieve went to its customers competing with it in the bag manufacturing business, not to enlarge its own production of multiwall bags. There is no suggestion that any merger or acquisition was contemplated; there was no conspiracy or action in concert with anyone else, and there is nothing else to indicate that there may be a substantial increase of International's nine per cent share of the multiwall bag market." at p. 97,356.

After a thorough discussion of not only the relevant market, but International's share of that market, the court concluded that:

> "There is no attempt to monopolize within the prohibition of Section 2 of the Sherman Act, unless there is both an intent to monopolize and a 'dangerous probability' that an actual monopoly will be achieved." at p. 97,357.

It is, therefore, apparent that the 4th Circuit has not taken the position that Petitioners contend.

Petitioners further argue that the decision below is inconsistent with the reasoning of the 7th Circuit referring to *Kearney & Trecker Corp. v. Giddings & Lewis, Inc.,* 452 F.2d 579 (7th Cir. 1971), *cert. denied* 405 U.S. 1066. In *Kearney* the parties had stipulated that the relevant market was "multifunction machine tools with automatic tool changes" and there was conclusive evidence that plaintiff controlled "about one-third of that market." In addition, plaintiff had a dominant patent position that

was broad enough to cover "not only every tool-changing system now in use, but also every tool-changing system that might be conceived in the future." Against this backdrop of broad-based economic power in the relevant market fortified by patent monopoly, it is manifestly obvious that the 7th Circuit has not dispensed with the necessity of proving dangerous probability by market analysis coupled with a delineation of the party's position in that market. In *Kearney* the defendant *had proved* the requisite elements of economic clout:

> "Thus, the uncontroverted evidence establishes plaintiff's *capacity* to commit the offense, its intent to acquire the power to exclude competition from a significant share of the market and its use of predatory means to accomplish its purpose." (Emphasis supplied) 452 F.2d 579 at 599.

When Justice Stevens spoke in terms of the *capacity* of the offender to reach monopoly status, it is clear from the context of the opinion that he was referring to the economic ability of the offender to exert an effect on prices and to illegally enlarge its share of the market. A definition of *capacity* therefore requires, in the 7th Circuit, an analysis of the market and the alleged offender's position in that market. See also *Mullis v. Arco Petroleum Corp.*, 502 F.2d 290 (7th Cir. 1974), *Bernard Food Industries, Inc. v. Dretene Co.*, 415 F.2d 1279, *cert. denied* 397 U.S. 912 (7th Cir. 1969).

While the position of the 9th Circuit is not as clear as that of all other circuits, it is clear that the 9th Circuit at the present time will require some showing of economic power. The 9th Circuit, however, chooses to speak in terms of "a substantial claim of restraint of trade". Regardless of the verbiage, however, even that circuit has modified its position substantially since its

controversial decision in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964), *cert. denied* 377 U.S. 993. In *Lessig*, the 9th Circuit flatly held that neither the probability of actual monoply nor a definition of the relevant market was essential in proving an attempt to monopolize. The *Lessig* position was subsequently approved in dicta in *Industrial Building Materials, Inc. v. Inter Chemical Corp.*, 437 F.2d 1336 (9th Cir. 1970). While giving lip service to the *Lessig* decision, the 9th Circuit never reached a ruling on the attempt to monopolize portion of the case since the posture of the case before it was an appeal from a motion for summary judgment and the factual issues had, accordingly, not been developed at trial.

In 1971 the 9th Circuit decided *Cornwell Quality Tools Co. v. C. T. S. Co., Inc.*, 446 F.2d 825 (9th Cir. 1971), *cert. denied* 404 U.S. 1049. In evaluating the attempted monopolization claim by C. T. S. the Court stated the following rule:

> "To convert Cornwell's conduct from vigorous competition into a separate Sherman Act offense, CTS had to prove two additional elements: (1) Cornwell had the specific intent to monopolize, and (2) it had sufficient market power to come dangerously close to success." (*Swift & Co. v. United States*, 196 U. S. 373) 446 F.2d 825 at 832.

The question of market power definition did not arise, however, because the Court concluded that there was insufficient evidence of specific intent.

In 1973 the 9th Circuit decided *Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972). In *Bushie*, the 9th Circuit expressly limited *Lessig* and *Industrial* to the facts stated in that opinion:

> "Bushie further contends that intent is the sole essential element of a claim of attempted monopolization,

and that no showing of Stenocord's power to monopolize the market is required. Language in our decision in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474 (9th Cir. 1964) and *Industrial Building Materials, Inc. v. Inter Chemical Corp., supra,* 437 F.2d at 1344, suggests such a proposition, but the language must be read in the context of those cases. In both, the attempted monopolization claim was founded upon a substantial claim of restraint of trade, from which we indicated that specific intent required for a claim of attempt to monopolize could be inferred. No such foundation is present here. 460 F.2d at 120.

The Court referred to a "substantial claim of restraint of trade" as shorthand for the necessary economic power in a relevant market.

In 1973, the 9th Circuit decided *Hallmark Industry v. Reynolds Metals Co.*, 489 F.2d 8 (9th Cir. 1973), *cert. denied* 417 U.S. 932. In *Hallmark* the 9th Circuit retreated further from the often criticized and uncomfortable position it had taken in *Lessig* and *Industrial*. The 9th Circuit had always held that a necessary requirement of a Section 2 attempt case is proof of specific intent to monopolize, but in *Hallmark* the 9th Circuit specifically required that there be a showing of a "dangerous probability." Dangerous probability could be proved either by evidence of market power within the relevant market or by proof of a "substantial claim of restraint of trade." It is clear from *Hallmark* that the 9th Circuit has relegated the *Lessig* doctrine to something approaching a mere rule of evidence.

> "However, *Lessig, Industrial Building Materials*, and *Moore*, supra, hold that dangerous probability may also be shown through proof of specific intent to set prices or exclude competition in a portion of the market without legitimate business purpose. This specific intent must be accompanied by predatory conduct directed to accomplishing the unlawful purpose. Ordinarily specific intent is difficult to prove and will be inferred from such anticompetitive conduct. Therefore evidence of market power may be relevant, but it is not indispensable where a substantial claim of restraint of trade is made." 489 F.2d 8, at 12-13.

The *Hallmark* opinion was decided on the ground that there was insufficient evidence indicating that the defendant had the required specific intent to monopolize the market for aluminum huts in Vietnam. The question, therefore, of whether the necessary dangerous probability can, in fact, be shown by evidence of a specific intent absent evidence of market power was never reached.

In November, 1975, the 9th Circuit decided *Pacific Coast Agricultural Export Association v. Sunkist Growers, Inc.*, 1975-2 CCH Trade Cases Para. 60,617 (9th Cir. No. 44-10 94, etc., November 11, 1975). In *Sunkist*, the Court made a detailed analysis of substantial evidence both of Sunkist's power in the market as well as the boundaries of the relevant market itself. The jury found from the evidence that Sunkist possessed monopoly power in the relevant market. From this finding it is so obvious as to hardly require comment that Sunkist possessed sufficient market power to be guilty of an attempt to monopolize. The Court referred to what it denominated the "*Hallmark*" test and while a portion of that test is quoted in petitioners' brief at pages 12, 13, the entire quotation changes the context substantially:

> "*Hallmark* suggests that the requisite 'dangerous probability' of success can be inferred from either specific intent coupled with monopoly power or from 'proof

> of specific intent to set prices or exclude competition . . . accompanied by predatory conduct directed to accomplishing the unlawful purpose.' 489 F.2d at 12. Since the jury specifically found, in answer to written interrogatories, both specific intent and monopoly power, the *Hallmark* test is satisfied."

Where a jury specifically finds not only monopoly power but also a specific intent to obtain a monopoly position which by action ripens into a monopoly, it is clear that all requirements for the finding of an attempted monopoly are met. It may well be that the 9th Circuit has now construed the *"Hallmark"* test as being satisfied when a defendant has both specific intent and economic power. In any event, it is obvious that *Lessig* is not a viable decision even in the 9th Circuit. It has, in fact, been disapproved by District Courts sitting within that circuit. For example, see *No-Joint Concrete Pipe Co. v. American Concrete Agricultural Pipe Association*, Civil No. 63-928-MP (S.D. Cal. May 20, 1966); *Batris W. Perovich v. Pipe Linings, Inc.*, Civil No. 63-278-MP (C.D. Cal. April 6, 1967). See also *Bailey's Bakery, Ltd. v. Continental Baking Co.*, Civil No. 2113 (D. Hawaii, 1964) ("reasonable probability" of monopolization required); *Ampex Corp. v. Mach-Tronics, Inc.*, Civil No. 90943 (N.E. Cal. 1966) ("reasonable probability" that monopolization may occur required). This Court should allow *Lessig* to die its natural death.

CONCLUSION

A cursory study of this Court's decisions in the attempt area conclusively establishes that evidence of the defendant's economic ability in the relevant market has always been required. Bearing in mind that in the final analysis Section 2 is directed against monopolization, this

Court and the United States Courts of Appeals have uniformly refused to apply Section 2 attempt prohibitions absent some showing of a likelihood that the defendant's attempt will be successful. It should be axiomatic that no reasoned judgment of an actor's conduct can be formed in an evidentiary vacuum. Yet, this is the precise posture in which this case is presented. Based on the record, it is difficult to imagine a more inappropriate case for review.

As the matter now stands, petitioners will have their day in court and, accordingly, an opportunity to present relevant and meaningful evidence at trial. This Court, in the exercise of sound discretion, should refuse certiorari.

Respectfully submitted,

FRANK SETH HURD
JASON C. BLACKFORD
C. R. KELLER, JR.
2500 Terminal Tower
Cleveland, Ohio 44113
Attorneys for Respondents Bonne Bell, Inc. and Jess Bell

Of Counsel:

WESTON, HURD, FALLON, PAISLEY & HOWLEY
2500 Terminal Tower
Cleveland, Ohio 44113